IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 85 OF 1998.

1. Shri Joao Salvador Jesus
   Mario Cotta Pereira,
   major in age, married,
   and his wife;

2. Smt. Rolanda Pereira,
   major in age, housewife,
   both residing at Bandra (West),
   Mumbai. ... Appellants/
   Defendants.

VERSUS

Smt. Fatima Electra Jasmina D'Silva,
major in age, w/o Shri Gaudencio D'Silva,
resident of Carxeta, Velim, Salcete, Goa,
represented herein by her duly
constituted Attorney Shri Pedro
Damiao Lazario Caeiro,
son of Domingos Caeiro,
major in age, businessman,
resident of Navelim,
Salcete, Goa. ... Respondent/
Plaintiff.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Appellants.

Shri P.S. Rao, Advocate for the Respondent.

CORAM: N.A. BRITTO, J.

DATE: 22ND APRIL, 2004.

ORAL JUDGMENT:

This appeal is filed against the Judgment/Decree dated 12.3.1998 of the learned IInd Addl. Civil Judge, Senior Division, Margao . The appellants herein were the defendants in S.C.S. No.21/96. The plaintiff in S.C.S. No.21/96 is the purchaser and the defendants are the sellers of the

southern portion of the property known as "Nelitoleaxeta" admeasuring 2315 sq.m. which was sold to the said defendants by deed dated 16.4.1991 and which deed was preceded by private agreement executed six to seven months before and was followed by deed of rectification dated 24.9.93.

2. The case of the plaintiff was that in the said property sold by the defendants there was a house occupied by Martha and Elvira Furtado who had put some illegal structure in the property and as a result of which the plaintiff had filed a suit against them bearing S.C.S. No.215/91/B and in the said suit the said Martha and Elvira had filed a written statement on 23.6.93 and had produced a document (Exh.PW1/E1) executed by the Uncle of defendant no.1, Joaquim Francisco Roque Santana Cotta whereby the property in an area of 2675 sq.mtrs. was agreed to be sold by the said Joaquim Francisco to Smt. Teresa Gomes, the late mother of the said Martha and Elvira for a consideration of Rs.55,000/-.

3. The plaintiff had stated that the said agreement showed that the area agreed to be sold to the said Teresa Gomes was the southern portion of the property "Nelitoleaxeta" and the northern

portion was at that time already sold to some other party (Mrs. Rosada Crasto) and the portion agreed to be sold to Smt. Teresa Gomes was the only portion which had remained to be sold.

4. The plaintiff stated that at that time when the property was sold to the plaintiff, the defendants had shown a road in the remaining portion and, as such, the area of the remaining plot sold to the plaintiff was shown as 2315 sq.m. and that the said agreement also showed that the late Uncle, the said Joaquim Francisco even gave possession of the said remaining portion to the said Smt. Teresa Gomes. The plaintiff stated that inspite of the agreement which ought to have been noticed by the defendants, the defendants sold the property to the plaintiff for consideration of Rs. 2 lakhs and that in the said sale deed it was mentioned that the defendants would have right to the said property and that it was free from all charges and encumbrances whatsoever and that the defendants had also stated in the said sale deed that they would fully compensate the plaintiff in case the plaintiff was deprived of the possession of the property or any part thereof due to any defect in the title of the defendants.

5. The plaintiff stated that in view of the said agreement executed by the said Joaquim Francisco, the late Uncle of the defendants, the possession of the said property was with Martha and Elvira and the plaintiff was deprived of the possession of the said property and the said Martha and Elvira did not allow the plaintiff or her attorney to enter the said property.

6. The plaintiff therefore prayed for recovery of Rs. 2 lakhs being the consideration paid by the plaintiff to the defendants, Rs.12,000/- being the sum spent by the plaintiff on the stamp paper, Rs.5000/- being the expenses incurred by the plaintiff for completion of the sale deed and Rs.10,000/- by way of expenses incurred by the plaintiff due to litigation, and in all, the plaintiff claimed Rs.2,27,000/- with interest at the rate of 22% from 16.4.91.

7. The plaintiff stated that through her Advocate the plaintiff sent a notice on 30.6.95 to the defendants by registered A.D. and demanded the payment of the said amount but the defendants who received the said notice, did not even care to reply to the same. The plaintiff stated that the cause of action for the present suit arose on 20.6.83 when

the said Martha and Elvira filed their written statement in the said S.C.S. No.215/91/B whereby the existence of the said documents came to the knowledge of the plaintiff.

8. The defendants contested the suit and it was their case that the suit was bad in law, misconceived and not maintainable.

9. The defendants stated that the so called document/private instrument produced by the said Martha and Elvira Furtado in the said S.C.S. No.215/91/B was a forged document. The defendants stated that their Uncle the said Joaquim Francisco never signed the same and hence the same was not binding on the defendants. The defendants stated that the said Martha and Elvira Furtado had forged the signature of their Uncle Joaquim Francisco on the said private document and the same was null and void and not binding on the defendants. The defendants stated that no registered deed was executed in respect of the said document nor the said Martha did take any steps for further execution of the said document and, as such the said document was bogus and fraudulent. The defendants stated that the said Martha and Elvira had not produced any receipt of payment of the said sum of Rs.55,000/-.

10. The defendants stated that their Uncle the said Joaquim Francisco never agreed to sell to the said Martha and Francisco the said area of 2675 sq.m. and that the said Martha and Elvira were trying to grab the said property by fraudulent means. The defendants stated that if at all their said Uncle the said Joaquim had received the sum of Rs.55,000/- from the said Martha and Elvira, nothing prevented them from filing a suit to recover the said property from the defendants after the death of the said Joaquim Francisco. The defendants stated that the said Martha and Elvira did not even send a notice to the defendants nor did they produce the said document through the defendants who laid a claim to the said property and therefore the said Martha and Elvira are not entitled for any relief against the defendants as well as against the plaintiff.

11. The defendants stated that the said private document produced by the said Martha and Elvira was a bogus and fraudulent document and not binding on the defendants. The defendants denied that their Uncle had given possession of the said remaining portion of the property to the said Smt. Teresa, the mother of the said Martha and Elvira.

12. The defendants stated that the plaintiff when he purchased the property was aware of and had taken inspection of all the documents and after being satisfied about the title of the defendants agreed to purchase the said property and that the defendants had sold the same at a lower rate due to the existence of the mundcarial house in the said property and that the plaintiff at that time had told the defendants that she was buying the property leaving the said mundcarial house and due to which the defendants agreed to sell the property at a lower price.

13. The defendants stated that the plaintiff was not entitled to any compensation as the plaintiff is already in possession and enjoyment of the said property ever since the purchase in the year 1991. The defendants denied that the plaintiff was deprived by the said Martha and Elvira from entering in the said property. The defendants further stated that the plaintiff was not entitled to any compensation from the defendants as the plaintiff had enjoyed the property from the time of its purchase in 1991. The defendants denied that the plaintiff was entitled to the said sum of Rs.2,27,000/- with interest from 16.4.1991.

14. In support of his claim, the plaintiff had examined her attorney and one Anthony Coelho. The defendants examined defendant No.1 (DW.1) and one Marcelino Fernandes (DW.2). The learned Trial Court had framed issues on 10.10.97, but at the time of delivering the judgment, proceeded to re-frame the said issues as the learned trial Judge found that the issues earlier framed by him were not clear. Thereafter the learned trial Court came to the conclusion that the said document dated 16.4.91 was executed under a mistake though both the parties had been aware about the same and therefore section 20 of the Indian Contract Act became applicable to the suit. At the same time the learned Trial Court also found that the said sale deed was executed by the defendants fraudulently when here again it was not the case of the plaintiff that his suit was based on any fraud committed by the defendants.

15. At the time of arguments, Shri Lotlikar, learned senior counsel appearing on behalf of the appellants/defendants, has submitted that the suit of the plaintiff was filed for recovery of money and some other expenses simpliciter and that the plaintiff has not sought any declaration regarding the said sale deed dated 16.4.91. Shri Lotlikar has further submitted that the plaintiff has also not

joined the said sisters namely Martha and Elvira to the suit. It is the submission of learned senior counsel Shri Lotlikar that the suit for recovery of consideration simpliciter without relief for cancellation of the sale deed is not maintainable for the simple reason that by virtue of the sale deed the Plaintiff will continue to be the owner of the property sold and at the same time receive the consideration paid for by him. Shri Lotlikar has next submitted that the plaintiff has led no evidence regarding the possession of the said Martha and Elvira and if at all evidence is led by the plaintiff the same pertains to obstruction by the said Martha and Elvira. Shri Lotlikar has further submitted that the sale deed itself mentions that the plaintiff was put in possession of the property sold. Shri Lotlikar has submitted that the said agreement/private writing (Exh.PW1/E1) was not produced before the trial court and in any event the contents of the same were not proved.

16. On the other hand, learned Advocate Shri Rao has submitted that the said sale deed dated 16.4.91 was executed by mistake and therefore the plaintiff was entitled to rescind the said sale. When asked as to why the plaintiff did not seek a declaration that the sale deed should be declared null and void,

learned Advocate Shri Rao has submitted that the said relief could be moulded by this court and granted to the plaintiff. In this context, learned Advocate Shri Rao has also referred to the provisions of Order 41, Rule 42 C.P.C. Learned Advocate Shri Rao has further submitted that the plaintiff was not given possession of the said property pursuant to the execution of the said sale deed.

17. At the outset, it must be noted that the submissions of learned Advocate Shri Rao appear to be totally misconceived. The plaintiff has used the said so called agreement (Exh.PW1/E1) as a ruse to get out of the situation she is placed and to recover the consideration paid for sale deed probably because of interference created by the said Martha and Elvira with the possession of the plaintiff. The learned trial court has come to the conclusion that the said agreement/private writing dated 2.4.86 (Exh.Pw.1/E24 24 erved to be admitted in evidence and that the same did not become inadmissible in evidence. Whatever that means, the fact remains that the original of the said agreement/private writing was not produced before the trial court and what was sought to be produced was a copy which was certified to be a copy by the

Notary. The defendants had taken the plea that the said agreement was bogus and fraudulent. Admittedly, the said agreement was not at all stamped nor signed by the other party namely Smt. Teresa Gomes. As regards the said agreement P.W.1 had stated that he had received the said certified copy from the said Martha and Elvira through one of his employees namely Ajit Kumar. The plaintiff had not examined either the said Martha or Elvira nor the said Ajit in support of the said statement. Moreover, the plaintiff had not even got identified whether the signature which was purported to be of the said Uncle of the defendants was really that of the said Uncle, apart from the fact that the plaintiff had not produced the original of the same. It was the duty of the plaintiff to have summoned the said Martha and Elvira to produce the said agreement and prove the same as required under law. Suffice to observe that the said agreement was not at all proved by the plaintiff inspite of the plea taken by the defendants that it was fraudulent. In my opinion, therefore, the learned trial court was totally wrong in coming to the conclusion that the so called agreement could be admitted in evidence. At the cost of repetition, it may be observed that the said agreement was not at all proved by the plaintiff. One fails to understand as to how the

said Martha and Elvira could have given a notarised copy of the said agreement to the attorney of the Plaintiff and at the same time obstruct the Plaintiff in the enjoyment of the property.

The second aspect which needs consideration is regarding possession. The sale deed dated 16.4.91 reads thus :-

> " In pursuance of the said agreement and in consideration of the sum of Rs. 6,00,000/- (Rupees six lakhs only) received by the VENDORS from the PURCHASER, receipt whereof the VENDORS do and each of them doth hereby admit and acknowledge and from the same and every part thereof do acquit, release and discharge the PURCHASERS forever, the VENDORS do hereby sell, transfer, grant, release, convey and assure UNTO the PURCHASERS all that the said property named "CARANGUINIM PEQUENO alias VOLXI" (three quarter parts) situated in the village of Aquem, presently within the jurisdiction of Village Panchayat of Aquem Baixo, admeasuring 20,000 square metres, more particularly described in the SCHEDULE appended hereunder, together with all rights, title,, claim, use, benefit, interest and demand whatsoever of them the VENDORS into and out of the said property so that the PURCHASERS may hereafter HAVE AND HOLD the said property unto themselves absolutely and forever together with all action, domain, appurtenances and hereditaments whatsoever. "

19. The said clause of the deed gives a clear impression that by the execution of the sale deed the defendants conveyed possession of the said property to the plaintiff. That apart it was not a case of the plaintiff in the plaint that along with the sale deed the plaintiff had not received the possession of the property. If that was the case the plaintiff's remedy might have been to recover possession of the property. All that the plaintiff stated in the plaint was that the plaintiff was deprived possession of the property by the said Martha and Elvira. It follows that after the plaintiff got possession of the property through the said sale deed the plaintiff has been deprived of the said possession by the said Martha and Elvira and if that is so the plaintiff ought to have taken action according to law against the said Martha and Elvira. Again it must be stated that DW.1 Mario Pereira has categorically stated that possession of the suit property was given on the day the sale deed was executed by the plaintiff and that the plaintiff (P.W.1) had brought to his notice that he was dispossessed. The said statements of D.W.1 have remained uncontroverted and falsify the claim now made by the plaintiff that the Plaintiff was not given possession of the suit property at the time of execution of the sale deed.

20. Although the plaintiff failed to prove that the said agreement (Exh.PW1/E1) was executed by the Uncle of the defendants, even in case there was such an agreement, it was only a promise made to sell and such a promise could not have created, in favour of the defendants, any interest in the property. That apart, the plaintiff had also failed to prove by acceptable evidence that the said Martha and Elvira or for that matter prior to that their mother had come in possession of the suit property pursuant to the said agreement/private writing. At the cost of repetition it may be stated that the plaintiff is seeking to recover the consideration paid by her possibly because of the interference of the said Martha and Elvira in the enjoyment of the property purchased by the plaintiff. As the old adage goes, one cannot have the cake and eat it too. The plaintiff cannot have title to the property and at the same time recover the money paid by her as consideration for the said sale deed. Shri Lotlikar, the learned Senior Counsel is right when he submits that the plaintiff could not have filed a suit for recovery of consideration paid without seeking cancellation of the sale deed. Granting of reliefs not prayed for is one thing and moulding of reliefs is quite another. Reliefs not sought cannot

always be granted on the principle that reliefs can be moulded. The plaintiff came before the Court with a definite case and it was for the plaintiff to prove the same. As stated before, the said agreement/private writing which appears to be of dubious character, has been made as a ruse by the plaintiff to get back the money paid by her because of interference of the said mundcars in the enjoyment of the property purchased by the plaintiff.

21. In view of the above, the appeal is bound to succeed and the judgment and decree of the trial court deserve to be set aside. Consequently the suit of the plaintiff shall stand dismissed with costs throughout.

N. A. BRITTO, J.

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